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motion for a rehearing was denied on March 2, 1954 (R. 401). On May 26, 1954, by order of the Chief Justice, the time for filing a petition for a writ of certiorari was extended to and including July 30, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTIONS PRESENTED

The Merchant Ship Sales Act of 1946 authorized the Maritime Commission to sell surplus war-built vessels at a "statutory sales price" to be established by the Commission pursuant to statutory guides. In purchasing tankers from the Commission under this Act, respondents expressly agreed (under protest) to pay for certain valuable features which the Commission believed it was entitled to take into account. After receiving the ships, the respondents sued in the Court of Claims to recover the sums paid for these features on the ground that the Act did not authorize their inclusion in fixing the "statutory sales price". The Court of Claims agreed with respondents and gave them judgment. The questions presented are:

1. Whether the Ship Sales Act (a) creates in buyers judicially enforceable rights to purchase vessels at a price precisely calculated according to the statutory formula, and (b) deprives the Maritime Commission of authority to interpret, add to, or enlarge upon the factors specifically

included in the legislative definition of the selling price.

2. Whether, after the contracts are performed, the buyers are estopped to demand repayment of part of the contract price while retaining the ships.

3. Whether the Court of Claims could properly order the Government to repay a part of the purchase price without affording the Maritime Administration (successor to the Commission) an opportunity to determine whether it would have made the sales without the provisions invalidated by the court.

4. Whether the Court of Claims has jurisdiction of an action to recover money required by an administrative agency to be paid to it under color of a statutory authorization.

STATUTE INVOLVED

The pertinent provisions of the Merchant Ship Sales Act of 1946, 60 Stat. 41, as amended, 50 U. S. C. App. 1735 *et seq.*, are set forth in Appendix A, *infra*, pp. 27–30.

STATEMENT

The respondents brought two actions (under 28 U. S. C. 1491), which were consolidated for trial (R. 183), in the Court of Claims to recover part of the purchase price of ships bought by them from the United States Maritime Commission under the Merchant Ship Sales Act of 1946,

infra, pp. 27–30 (R. 2, 32). Their claim was that the Commission had violated the pricing formula of the Act by imposing each of two charges: (1) a charge of $16,600.00 to each buyer for the installation of "slotting and strapping" in the hulls of their ships (R. 5, 35), and (2) a charge of $5,116.79 to the respondent Southeastern for the value of certain repairs made by the Commission on Southeastern's vessel before her sale (R. 7). The claims were upheld by the court on respondents' motions for summary judgment. The pertinent facts, as they appear from the pleadings and exhibits, are as follows:

Southeastern purchased the S. S. *Kern Hills* from the Maritime Commission under a contract dated January 14, 1948 (R. 10), and Paco purchased the S. S. *Northfield,* under a contract dated February 26, 1948 (R. 40). Both the *Northfield* and the *Kern Hills* were type T2–SE–A1, or, as they were commonly known, type T2 tankers, two of a class of some 500 war-built tankers having hulls of all-welded construction, most of which were offered for sale under the Ship Sales Act (R. 126, 192).

The statutory pricing formula. Section 4 of the Act, *infra,* p. 30, directed the Commission [2]

[2] The functions of the Commission were transferred to the Secretary of Commerce, acting through the Maritime Administration, in 1950. 15 F. R. 3178; 64 Stat. 1276, 1277. Power to sell vessels under the Act terminated on January 15, 1951, by virtue of Section 14 (60 Stat. 50, as amended, 50 U. S. C. App. 1735, note).

to sell war-built ships at a "statutory sales price" to be established by the Commission in the manner described below. Section 3 (d) defined the "statutory sales price" in terms of a percentage, 87½ in the case of tankers, of "prewar domestic cost." "Prewar domestic cost" was to be the cost, as estimated by the Commission, of constructing a hypothetical standard tanker in American shipyards under conditions prevailing on January 1, 1941. After thus calculating the standard "statutory sales price," the Commission was to make certain adjustments, as they might apply to each vessel sold. These adjustments were: (1) a deduction for depreciation, according to the age of the ship; (2) a deduction for the cost of putting the ship "in class,"[3] in cases where the condition of the vessel was below the minimum class requirements of the Coast Guard and the American Bureau of Shipping; (3) a deduction for the cost of installing any "desirable features" (other than features necessary to put the vessel in class) that might be present in the Commission's hypothetical standard vessel but absent from the particular vessel sold; and (4) an increment to cover the value of desirable fea-

[3] A ship is said to be "in class" when it conforms to the minimum requirements established by regulations of the Coast Guard and of the American Bureau of Shipping in relation to construction, safety features, and the like, and passes inspection by these agencies. See 49 Stat. 1384, as amended, 46 U. S. C. 369; *Southeastern Oil Delaware, Inc.* v. *United States*, 124 C. Cls. 561.

tures contained in the vessel sold and lacking in the standard vessel. Finally, Section 3 (d) provides that the statutory sales price as thus adjusted is in no event to be less than a "floor price," which in the case of tankers is fixed by the Act at 50 per cent of "domestic war cost."[4] On April 23, 1946, the Commission published the controlling figures for T2 tankers. 11 F. R. 4459. These established the unadjusted "statutory sales price" at $2,026,500 and the "floor price" at $1,505,352.

Slotting and strapping. During World War II, ships, including tankers, were built with welded hulls, the first use of all-welded construction on a large scale (R. 128). The former practice of riveting was abandoned in the interest of savings in time and in drain on the labor force (R. 126, 128). After welded hulls had come into extensive use, it began to appear that, owing to the somewhat rigid structure created, the welded plates tended to crack, and the cracks tended to extend entirely around the hull, so that a number of T2 tankers broke in two (R. 128–133). To combat this deficiency, the device of crack arrestors, or "slotting and strapping", was developed (R. 232, 235). This device consisted of cutting four longitudinal slots, about two hundred feet in length,

[4] "Domestic war cost," like prewar domestic cost, is a figure fixed by the Commission; it is based on the cost of a hypothetical ship, calculated on the basis of labor and material prices as of 1944.

in the hulls and covering these slots with riveted steel straps (R. 138–143, 236–239). By this means flexibility was introduced, so that cracks that started in the welded plates would stop at the riveted straps and not spread around the entire hull (R. 119). In May 1947, the American Bureau of Shipping recommended the installation of slotting and strapping on all T2 tankers (R. 236–238), and on December 15, 1947, the Commandant of the Coast Guard directed the withholding of certificates of inspection from ships that failed to comply (R. 144).

When the American Bureau of Shipping recommended the installation of slotting and strapping in May 1947, the Maritime Commission undertook to perform this work on all T2 tankers that were up for sale to American buyers (R. 244). The Commission took the position, however, that the buyers should be required to pay the cost of the installation. A number of prospective buyers included with their offers covering letters to the effect that, in the buyers' view of the law, they could not be required to pay for this work (R. 241–242). These offers the Commission rejected (R. 241–242).

Pursuant to its policy of requiring buyers to pay for the cost of slotting and strapping, the Commission inserted in the contracts offered to both respondents, in early 1948, the following clause (R. 4, 33):

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> Any vessel of the T2 type that is strengthened [*i. e.,* slotted and strapped] * * * shall be considered as having an additional desirable feature within the meaning of clause (3) of Section 3 (d) of the Act, and the Buyer shall pay for such additional desirable feature an amount determined by the Commission * * *.

The contracts containing these clauses were accepted by the respondents (*ibid.*), both respondents, however, returning with the signed contracts letters protesting against the inclusion of these clauses (R. 21, 34). Under these clauses the respondents deposited $28,875 each, pending determination by the Commission of the sum to be added to the statutory sales price to account for slotting and strapping (R. 5, 34). In June 1951, the Commission determined that the amount to be charged the buyers for slotting and strapping was to be $16,600.00 per vessel (R. 253); deducting this amount from the sum deposited by respondents, the Commission returned the balance to respondents (R. 5, 35). The amount thus paid by them the respondents sought to recover in the present actions.[5]

[5] As appears from the provision quoted above, pp. 8-9, the contracts of sale contemplated that the increase in the statutory sales price be computed by treating slotting and strapping as a "desirable feature" within the meaning of the Act. At the time of the contracts the Commission's method of adjusting for the presence of desirable features involved adding the value of the desirable features to the figure first obtained by making all other adjustments under the Act. Thus, in the case of Southeastern, $16,600.00 was added to

Repair work. During the period that vessels were being sold under the Ship Sales Act, the Maritime Commission continued to operate for its own account, under general agency agreements, many of the vessels subject to sale.[6] The vessels thus operated included a number of T2 tankers. In the operation of these ships the Commission spent its funds on upkeep and repairs, which the Commission carried out on a scale considerably larger than the minimum necessary to keep the ships "in class" (R. 247–250). As a result, most prospective buyers under the Ship Sales Act found it desirable to apply for ships in operation rather than for laid-up vessels. Not only would

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the adjusted statutory sales price of $1,737,808.79 (R. 14); and in the case of Paco, because the statutory adjustment for depreciation reduced the statutory sales price to the floor price of $1,505,352.00, the figure of $16,600.00 was added to the floor price.

In 1952, however, the decision of the court below in *A. H. Bull S. S. Co.* v. *United States*, 123 C. Cls. 520, altered the method of computation to one whereby the cost of desirable features was in effect added to the unadjusted statutory sales price before the other adjustments were made. Thus, as to each T2 tanker, $16,600.00 was added to the unadjusted statutory price of $2,026,500.00, and the resulting figure was then adjusted for depreciation and class allowance, if any. The effect was to subject desirable features to a deduction for depreciation as though they had been in the vessel from its launching. R. 51–53.

[6] The Commission's wartime authority to operate vessels under general agency agreements for government account was extended to March 1, 1948, by the Act of June 28, 1947, c. 161, 61 Stat. 190. $100,000,000 was appropriated for these operations during 1948. Act of July 31, 1947, c. 414, 61 Stat. 695, 697.

purchasers of such vessels acquire ships in better condition than the minimum required to keep the ships in class, but also they would obtain vessels that could be put into service without loss of the time required for putting the ships in class. The *Kern Hills,* for which the respondent Southeastern applied, was such a ship (R. 22).

The Commission was of the view that purchasers should pay the cost of such repair work, on the theory that buyers of those ships would be receiving more value than buyers of laid-up ships (R. 247–250). This position was strengthened when, after July 1, 1947, Congress forbade the Commission to use appropriated funds for the purpose of placing in class ships held for sale (Act of July 30, 1947, 61 Stat. 585, 603); the use of its own funds in repairing vessels for government operation, when the vessels shortly thereafter might be sold under the Ship Sales Act, the Commission regarded as an indirect violation of Congress' prohibition.

Accordingly, the Commission tendered to Southeastern a contract containing a clause (R. 6–7) requiring Southeastern to pay the cost of repairs in excess of the repairs necessary to meet class requirements.[7] Southeastern accepted this clause by executing the contract of which it was a part,

[7] The contract provided that this charge was to be reduced by $6,000 a month, representing depreciation, over the period that the ship was operated for Government account (R. 6).

and deposited $21,781.00 with the Commission, under the clause, to cover these repair charges pending determination by the Commission of their precise amount. The Commission subsequently determined the amount, and after making the adjustments called for by the repair clause found that $5,116.79 should be retained by the Government (R. 7).

The proceedings below. After executing the contracts, both respondents obtained delivery of and paid for the ships. In 1952, they brought these actions, seeking to recover the $16,600 paid by each of them for slotting and strapping and, in the case of Southeastern, the $5,116.79 paid for excess repairs. Both respondents moved for summary judgment. They contended that the slotting and strapping clause of the contracts was invalid because it was not authorized by the statute. Their theory was that no additions to the statutory sales price were provided by the Act except additions for desirable features and that, despite the fact that the contracts provided that slotting and strapping was a desirable feature, it could not be considered a desirable feature within the meaning of the Act, since it was a class requirement for all T2 tankers. Respondents contended that, because the clause was unauthorized, they were entitled to recover that part of the purchase price that represented the charge

for this element.[8] Southeastern made a similar contention in respect to the charge for repairs.

The Government's primary argument was that, whether or not slotting and strapping could validly be treated as a desirable feature under the Act, the Commission had power to reach a similar result by re-evaluating the hypothetical standard T2 tanker (on which the statutory sales price was based), so that slotting and strapping would be an integral feature of the standard vessel.[9] This, it was urged, the Commission had refrained from doing in reliance on the buyers' acceptance of the contract clause; therefore, the buyers were estopped to challenge the validity of the clause. As to the repair provision, the Government urged that this was a valid exercise of the Commission's power to administer the Act to carry out the policy announced by Congress.

The Court of Claims held that the Act required the Government to pay for repairing defects in ships sold and that slotting and strapping was equivalent to repairing a defect. It rejected the

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[8] Respondents also urged that the Commission had not applied the pricing formula in the way prescribed by *A. H. Bull S. S. Co.* v. *United States*, 123 C. Cls. 520, application of which would have eliminated the charge in the case of Paco, which was sold at the floor price. See fn. 5, *supra*, pp. 8–9.

[9] The statutory sales price for T2 tankers was established in April 1946 (*supra*, p. 6); slotting and strapping became a class requirement in 1947 (*supra*, p. 7); the two vessels were sold to respondents in January and February 1948 (*supra*, p. 4).

estoppel argument on the ground that "the parties could not, by contract, change the terms prescribed by the statute for the sale of the ships." Accordingly, it awarded summary judgment for the respondents (*infra*, p. 41). The Government moved for a rehearing, raising among other questions that of the jurisdiction of the court; this motion (R. 339) was denied (R. 401).

REASONS FOR GRANTING THE WRIT

This case presents important issues as to the power of the Court of Claims to excise, at the behest of the suing contractor, portions of executed disposal contracts which deviate from the court's interpretation of the statute authorizing the transactions, and then to compel unilateral readjustment of the contract price in favor of the contractor. These questions directly affect a large number of pending and prospective claims under the Merchant Ship Sales Act,[10] but they

[10] The Maritime Commission sold 149 T2 tankers under contracts containing clauses requiring, in terms substantially similar to those of the present contracts, that the cost of slotting and strapping be added to the purchase price. These 149 ships involve potential claims for slotting and strapping alone of well over $2,000,000. Sixty-five (65) of these claims are already pending in the court below. Some twenty-five (25) of the cases pending below also involve clauses, similar to that in Southeastern's contract, concerning payment for repairs on vessels formerly operated by the Commission (*supra*, pp. 9–11); these repair claims amount to roughly $750,000. Finally, the validity of contract terms adopting a challenged view of statutory pricing provisions is involved in a large number of charters under Section 5 of the Ship

extend by implication to the entire field of government procurement and the disposal of government property. Together with the companion case of *United States* v. *Clapp* (No. 248, this Term), the case also raises the significant issue of the right of one who obtains government property or other benefits from an administrative agency on an agreed condition to retain the benefit of the administrative award while attacking the validity of the condition. As a corollary, this and the *Clapp* case involve the power of the Court of Claims to set aside a term of the contract without affording the administrative agency an opportunity to show whether it would have entered into the transaction in the absence of the allegedly invalid term.

All these questions the court below has summarily disposed of without considering controlling principles long established by this Court in the field of government contracts. Fresh affirmation of these doctrines by the Court will be of

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Sales Act. Section 5 provided that the Commission might charter vessels to private applicants under bareboat charters providing for payment to the government as charter hire of one-half of all profits in excess of ten per cent. The Commission entered into charters providing for recapture of profits on a sliding scale ranging up to 90 percent of profits in excess of ten per cent. If, as seems likely, these rates are held by the court below, on the basis of the present decision, to be recoverable by the charterers as violating the terms of the statute, the Maritime Administration estimates that the government will be open to potential claims of $40,000,000.

widespread importance both in the maritime field and more generally.

1. The initial holding of the Court of Claims was that the contract provisions adding the cost of slotting and strapping and of prior repairs were not consonant with the pricing formula fixed by the Act, and that the parties could not, by contract, interpret the statutory pricing formula differently from the view subsequently adopted by the court. In both respects, we think, the court ignored settled principles for construing legislation authorizing contracts for the procurement or disposal of government property.

a. By holding that "the parties could not, by contract, change the terms prescribed by the statute" (App. 36), the court in effect held that the statute confers rights on the buyer apart from the contract. Such a decision overlooks the broad principle of *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, that statutes prescribing the terms on which government procurement and disposal agencies are to contract confer no rights on the sellers or buyers to sell or buy on the statutory terms; these statutes constitute merely directions to, and a conferral of authority by the Government upon, its agents. As the Court has said, legislation specifying the terms on which a government agency must contract is "not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed

restraint for violation of which the Government—but not private litigants—can complain." *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 127; cf. *Goldberg* v. *Daniels,* 231 U. S. 218, 221; *United States* v. *New York and P. R. S. S. Co.,* 239 U. S. 88, 92, 93.

The Ship Sales Act conforms with this accepted principle. The Commission was authorized to sell to qualified applicants at the "statutory sales price," but determination of the "statutory sales price," involving appraisal of many complex industrial factors, was, as we show below, *infra,* pp. 17–20, necessarily committed to the Commission. And before making a sale the Commission was to find both that the potential purchaser was qualified and also "that such sale will aid in carrying out the policies of this Act". Section 4, *infra,* p. 30. No provision in the statute indicates that Congress endowed the buyer with judicially enforceable rights to compel the Commission to accept his interpretation of the statutory sales price and to dispose of the vessel at that figure. On the contrary, the Act contemplates that ship sales be consummated by contract (see, *e. g.,* Section 4 (c)) and the inference is clear that the parties were to be bound by the terms on which they agreed. In short, the statute conferred no right on respondents to have the ships at any particular price; they must look to their contracts as the measure of all the rights they received.

b. In drawing the buyers' rights directly from the statute rather than from the contracts, the Court of Claims also overlooked the broad discretion conferred by the Ship Sales Act on the Maritime Commission in establishing the sales price. The parties agreed by their contracts that slotting and strapping should be treated as a "desirable feature" within the meaning of the statute. *Supra,* pp. 7–8. The court was of the view that slotting and strapping was not a "desirable feature" as it construed that term. But the court was not empowered to substitute its construction for that of the parties.[11] In the field of property disposal, as in the field of government bounties and government contracts, broad latitude is always accorded to the administrative agency in giving content to terms on which the disposal is to be made, "even where executive duties 'require an interpretation of the law.' " *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 127; cf. *United States ex rel. Dunlap* v. *Black,* 128 U. S. 40, 48; *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U. S. 682.

Aside from some competitive bidding legislation, statutes authorizing the acquisition or sale of property by the Government are normally read, not as confining the official narrowly to the literal

[11] That a contract may use some of the same terms as the Act (e. g. "desirable features") does not mean that these terms must bear the same meaning as the court would give them in construing the statute on a *de novo* appraisal. Cf. *Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U. S. 667, 678.

terms of the text, but as conferring a wide span of business judgment in negotiation; enactments setting forth in as great detail as the Ship Sales Act the specifications and terms on which the Government's agents should contract have been held not to prevent the Government from contracting on terms more advantageous than those prescribed by the statute. *Gilbert & Secor* v. *United States,* 8 Wall. 358; cf. *Matson Navigation Co.* v. *United States,* 284 U. S. 352, 357–358. For it is not lightly to be assumed, at least in the commercial area, that Congress has deprived its agents of authority to make a beneficial agreement for the United States.

Within the seeming specificity of its pricing provisions, the Ship Sales Act actually conferred broad discretion on the Commission, both in fixing the selling price of the ships and in selling them. This the Act primarily did by providing, in Section 3 (c), *infra,* p. 27, that the Commission was to define the contents of the "standard vessel" upon which the entire statutory pricing scheme was based, as well as by leaving undefined the term "desirable features" in Section 3 (d) (3), *infra,* p. 28.[12] It seems that the Commission, had

[12] It is also important to note the constant emphasis throughout the Act on the Commission's "opinion" or "estimation" or "determination" or "satisfaction." See Sections 3 (c), (d) (1) (2) (3) (4), (e) and 4 (a) and (b), *infra,* pp. 27–30. Congress thus evinced a clear purpose not to restrict the Commission within narrow bounds, but to rely on its judgment, discretion, and expertise.

it wished to do so, would have been authorized to include slotting and strapping, or any other feature required of all T2 tankers (as was slotting and strapping in 1948), in its specifications for the standard ship. See *supra,* pp. 5–7. And it could as validly have done so by contract with each purchaser as by regulation applicable to all.[13] Likewise, the Act specifically left to the Commission's expertise the ultimate decision as to what were "desirable features" in war built tankers, (Section 3 (d) (3), *infra,* p. 28), and the Commission in this respect, too, could have exercised its discretion by contract as well as by rule.

These provisions are all significant, but the scope of the Commission's authority to contract for the Government's advantage should not be gathered from them alone, nor even from the express requirement that the ultimate criterion for each sale should be an administrative determination whether or not "such sale will aid in carrying out the policies of this Act." Section 4 (a), *infra,* p. 30. The basic premise should be that, since the Act deals with the disposition of Government property, it is to be construed and applied with the same eye to the protection of the Government's interest as is other legislation of that class.

2. In addition to its misconstruction of the Act, the Court of Claims was not warranted in partially setting aside the transactions, to the

[13] Such a decision would have resulted in the same price that the present contracts fixed.

Government's disadvantage, after the contracts had been fully performed and respondents had taken the benefit of their bargain.

a. Assuming *arguendo* that the respondents had rights under the statute to terms more beneficial than they received, they could waive these rights (cf. *Shutte* v. *Thompson,* 15 Wall. 151), and this they did by accepting and executing the contracts. Just as a party may not accept benefits conferred by a statute and at the same time attack the validity of the conditions imposed by the legislature (*e. g., Fahey* v. *Mallonee,* 332 U. S. 245, 255; *United States* v. *San Francisco,* 310 U. S. 16, 29), respondents should not be permitted to enjoy the benefits of the Commission's administrative decision to award them the ships and attack the validity of the conditions imposed by the Commission. Cf. *Callanan Road Co.* v. *United States,* 345 U. S. 507, 513. This is particularly true where, as here, the conditions are eminently fair and reasonable, and their excision would give the purchasers valuable additional features without requiring any *quid pro quo* in exchange. See also the Government's petition in *United States* v. *Clapp,* No. 24, this Term, pp. 12–13.

In formal terms, the vice of respondents' position is that they are claiming under the very contracts which they attack. They have abided by the terms of the contracts as to time and

manner of payment and as to other details of the transactions; until these actions they never insisted upon their supposed statutory, as distinguished from their contractual, rights.[14] It is settled that a party may not at the same time "claim both under and against the same deed" (*Gibson* v. *Lyon,* 115 U. S. 439, 447). And, in the very field of government contracts for the acquisition or disposal of property, this Court has always held contractors bound to the prices set by their contracts, even though they could have rejected the contracts and insisted on a better price under a statute or the Constitution. *American Smelting & Refining Co.* v. *United States,* 259 U. S. 75; *Matson Navigation Co.* v. *United States,* 284 U. S. 352; *Parish* v. *United States,* 8 Wall. 489, 490; cf. *Gray* v. *Commodity Credit Corp.,* 159 F. 2d 243 (C. A. 9), certiorari denied, 331 U. S. 842.[15]

[14] Respondents apparently sought to save their alleged statutory rights by protesting the inclusion of the disputed terms in the contracts, but nothing is more clearly settled than that they could not by protest alter the legal effect of their contracts. *E. g., American Smelting & Refining Co.* v. *United States*, 259 U. S. 75, 79; *International Contracting Co.* v. *Lamont*, 155 U. S. 303, 310; *Gilbert & Secor* v. *United States*, 8 Wall. 358; *Bank of the United States* v. *Bank of Washington*, 6 Pet. 8.

[15] Where the claimants have voluntarily paid money to the Government, they are also faced with the principle that money voluntarily paid to the Government under mistake of law cannot be recovered in the absence of a special statute. *United States* v. *Edmondston*, 181 U. S. 500; *Miller* v. *United States*, 42 C. Cls. 121; see *infra*, pp. 23–24.

Moreover, by their acceptance of the Commission's terms, the respondents may have in effect induced the Commission not to take action that would have increased the statutory sales price in a manner unassailable in the Court of Claims. As we have suggested, *supra,* pp. 18–19, it would have been within the power of the Commission to redefine the standard T2 tanker to include slotting and strapping, an installation required of all such vessels in 1948, the time of the contracts in this case. By doing so, the Commission could have increased the price by an amount similar to that fixed under these contracts as the price of slotting and strapping. Or the Commission could have refused to sell the vessels to purchasers who refused to pay for these additional features.[16] Now that history cannot be turned back, it is fair to hold respondents equitably estopped from denying validity to their contracts. At the very least, respondents should not be permitted to receive part of the purchase price without accounting for the fair value of the advantageous slotting and strapping and the extra repairs which they received. See, *e. g.,* 6 Williston, *Contracts* (Rev. ed.) § 1764.

b. From another viewpoint, the Court of Claims' error may be seen as a usurpation of the administrative discretion of the Maritime Com-

[16] As noted above (*supra*, p. 7), the Commission did reject offers accompanied by letters declaring that the buyers could not be required to pay for slotting and strapping.

mission. In the absence of knowledge as to whether the Commission would have made the sales if it had known that the slotting and strapping and prior repairs clauses would be held invalid, the court could not properly strike those clauses from the contracts and leave the remainder of the transactions standing. Such a procedure is squarely in conflict with the rationale of this Court's recent decision in *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 21; cf. *United States* v. *Jones*, 336 U. S. 641. See also the Government's petition in *United States* v. *Clapp*, No. 218, this Term, pp. 10–12.

The court was evidently of the view that this holding was justified because the statute left no discretion to the Commission, but required it to sell if the buyers were qualified. But, as we have shown (*supra*, pp. 17–19), "the discretion of the [Commission] was not ended by the receipt and opening of the bids, even though they satisfied all the conditions prescribed." *Goldberg* v. *Daniels*, 231 U. S. 218, 221. The Act contemplated that for good reasons the Commission could withhold vessels from sale, and certainly it could choose between qualified applicants for a given ship. There was therefore a choice, and the court should not have assumed to decide for itself that the balance would have swung in favor of the sales to the respondents. The determination was an administrative, not a judicial, one.

3. Finally, the Court of Claims has—*sub silentio* in this case and overtly in the companion case of *United States* v. *Clapp* (No. 248, this Term)—decided an important question as to the scope of its jurisdictional statute (28 U. S. C. 1491) in conflict with controlling decisions of this Court. In our opinion, this case is within the rule that the Court of Claims has no jurisdiction of an action to recover money required by administrative officers of the government to be paid to them under alleged authority of statute. *United States* v. *Holland-American Lijn,* 254 U. S. 148; cf. *United States* v. *Edmondston,* 181 U. S. 500. Our reasons for so believing are set forth in the petition for a writ of certiorari in the *Clapp* case, pp. 16–20.[17] If the rule is now to be abandoned, it should be done by this Court.

CONCLUSION

This case presents important issues bearing on federal procurement and property disposal legis-

[17] Our discussion of this question in the *Clapp* case points out (Pet. pp. 16–20) that jurisdiction may not be based either upon the statutory provision for actions "founded upon any Act of Congress" (28 U. S. C. 1491 (2)) or upon that for claims "for liquidated or unliquidated damages in cases not sounding in tort" (28 U. S. C. 1491 (5)). The only other conceivable basis in this case, the provision for actions "founded upon any express or implied contract" (28 U. S. C. 1491 (4)), is clearly not present. Respondents' whole claim is instinct with rejection of any consensual arrangement with the Government. Cf. *Baltimore Mail S. S. Co.* v. *United States,* 76 F. 2d 582 (C. A. 4), certiorari denied, 296 U. S. 595.

lation, as well as on the relationship of the Court of Claims to federal administrative agencies. A large number of maritime claims, both in the court below and still pending administratively, are directly affected by the ruling, and it seems bound to have a wide impact on other government disposal and procurement programs.

It is respectfully submitted, therefore, that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

JULY 1954.

APPENDICES

APPENDICES

APPENDIX A

The pertinent provisions of the Merchant Ship Sales Act of 1946, 60 Stat. 41, as amended, 50 U. S. C. App. 1735 *et seq.*, read as follows:

Sec. 3.

As used in this Act the term—

* * * * *

(c) "Prewar domestic cost", as applied to any type of vessel, means the amount determined by the Secretary, and published by the Secretary in the Federal Register, to be the amount for which a standard vessel of such type could have been constructed (without its national defense features) in the United States under normal conditions relating to labor, materials, and other elements of cost, obtaining on or about January 1, 1941. In no case shall the prewar domestic cost of any type of vessel be considered to be greater than 80 per centum of the domestic war cost of vessels of the same type.

(d) "Statutory sales price", as applied to a particular vessel, means, in the case of a dry-cargo vessel, an amount equal to 50 per centum of the prewar domestic cost of that type of vessel, and in the case of a tanker, such term means an amount equal to 87½ per centum of the prewar domestic cost of a tanker of that type, such amount in each case being adjusted as follows:

(1) If the Secretary is of the opinion that the vessel is not in class, there shall

be subtracted the amount estimated by the Secretary as the cost of putting the vessel in class.

(2) If the Secretary is of the opinion that the vessel lacks desirable features which are incorporated in the standard vessel used for the purpose of determining prewar domestic cost, and that the statutory sales price (unadjusted) would be lower if the standard vessel had also lacked such features, there shall be subtracted the amount estimated by the Secretary as the amount of such resulting difference in statutory sales price.

(3) If the Secretary is of the opinion that the vessel contains desirable features which are not incorporated in the standard vessel used for the purpose of determining prewar domestic cost, and that the statutory sales price (unadjusted) would be higher if the standard vessel had also contained such features, there shall be added the amount estimated by the Secretary as the amount of such resulting difference in statutory sales price.

(4) There shall be subtracted, as representing normal depreciation, an amount computed by applying to the statutory sales price (determined without regard to this paragraph) the rate of 5 per centum per annum for the period beginning with the date of the original delivery of the vessel by its builder and ending with the date of sale or charter to the applicant in question, and there shall also be subtracted an amount computed by applying to the statutory sales price (determined without regard to this paragraph) such rate not in excess of 3 per centum per annum in the case of a vessel other than a tanker, and not in ex-

cess of 4 per centum per annum in the case of a tanker, for such period or periods of war service as the Secretary determines will make reasonable allowance for excessive wear and tear by reason of war service which cannot be or has not been otherwise compensated for under this subsection.

No adjustment, except in respect of passenger vessels constructed before January 1, 1941, shall be made under this Act which will result in a statutory sales price which (1) in the case of dry-cargo vessels (except Liberty type vessels) will be less than 35 per centum of the domestic war cost of vessels of the same type, (2) in the case of any Liberty type vessel will be less than 31½ per centum of the domestic war cost of vessels of such type, or (3) in the case of a tanker will be less than 50 per centum of the domestic war cost of tankers of the same type. For the purposes of this Act, except section 5, all Liberty vessels shall be considered to be vessels of one and the same type.

(e) "Domestic war cost" as applied to any type of vessel means the average construction cost (without national defense features) as determined by the Secretary, of vessels of such type delivered during the calendar year 1944, except in case of any type of vessel the principal deliveries of which were made after the calendar year 1944, there shall be used in lieu of such year 1944 such period of not less than six consecutive calendar months as the Secretary shall find to be most representative of war production costs of such type.

* * * * *

Sec. 4. (a) Any citizen of the United States may make application to the Secretary to purchase a war-built vessel, under the jurisdiction and control of the Secretary, at the statutory sales price. If the Secretary determines that the applicant possesses the ability, experience, financial resources, and other qualifications, necessary to enable him to operate and maintain the vessel under normal competitive conditions, and that such sale will aid in carrying out the policies of this Act, the Secretary shall sell such vessel to the applicant at the statutory sales price.

(b) At the time of sale, the purchaser shall pay to the Secretary at least 25 per centum of the statutory sales price. The balance of the statutory sales price shall be payable in not more than twenty equal annual installments, with interest on the portion of the statutory sales price remaining unpaid, at the rate of 3½ per centum per annum, or shall be payable under such other amortization provisions which permit the purchaser to accelerate payment of the unpaid balance as the Secretary deems satisfactory. The obligation of the purchaser with respect to payment of such unpaid balance with interest shall be secured by a preferred mortgage on the vessel sold.

(c) The contract of sale, and the mortgage given to secure the payment of the unpaid balance of the purchase price, shall not restrict the lawful or proper use or operation of the vessel.

APPENDIX B

The opinion of the Court of Claims is as follows:

In the United States Court of Claims

(Decided November 3, 1953)

No. 50296

SOUTHEASTERN OIL FLORIDA, INC., v. THE UNITED STATES

No. 117–52

PACO TANKERS, INC., v. THE UNITED STATES

Mr. J. Franklin Fort for the plaintiffs. *Messrs. Radner, Zito, Kominers & Fort* and *Mr. Robert V. Faragher* were on the briefs.

Mr. Ernest C. Baynard, with whom was *Mr. Assistant Attorney General Warren E. Burger,* for the defendant.

ON PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

MADDEN, *Judge,* delivered the opinion of the court:

The plaintiff, Southeastern, purchased the type T2–SE–A1 tanker *Kern Hills*

from the former United States Maritime Commission on January 27, 1948, under a contract dated January 14, 1948. The plaintiff, Paco, purchased the type T2–SE–A1 type tanker *SS. Northfield* from the Commission in May 1948. In each case the Maritime Administrator, the successor to the Maritime Commission, in determining the ultimate purchase price of the vessels, charged the purchaser with the cost of "slotting and strapping" the vessels. The plaintiffs contend that they should not have been so charged, and sue to recover the amounts charged.

Until a few years before World War II, the steel plates of vessels were joined by overlapping and riveting. During the early years of the war, the all-welded method of construction was much used. The welded seams had the advantage of being leak proof, and the welding process was more rapid than the riveting process. But the resulting structure was rigid, too rigid to withstand the strains. Some of these vessels developed cracks which, once started, would spread from plate to plate throughout the vessel. Some welded Liberty ships and at least one welded T2 tanker broke in two. The slotting and strapping device was brought forward to correct the defects in welded ships. Four longitudinal slots, each about two hundred feet long, were cut in the midsection of the hull of the vessels. These slots were then covered with steel straps riveted to the plates of the ship. The straps applied to the T2 type tankers weighed about eighteen tons for each ship.

The sales by the Commission to the plaintiff were made under the Merchant Ship Sales Act of 1946, 60 Stat. 41, as amended, 62 Stat. 1199; 50 App. U. S. C. 1735 ff.

The scheme and purpose of that statute are discussed in detail in our decision in *A. H. Bull Steamship Co.* v. *United States,* 123 C. Cls. 520, and *Southeastern Oil Delaware, Inc.* v. *United States,* 124 C. Cls. 561, and will not be treated extensively here. The Act provided that the Commission's surplus merchant ships should be sold to qualified operators at prices to be fixed by a statutory formula for each type of ship, with certain permissible variations from that formula. One of the permissible bases for an increase in the price of a particular ship was the presence of "desirable features" on that ship, which features were not present on the standard ship of that type.

By the time the tankers involved in this suit were sold to the plaintiffs, the defects in the all-welded ships had been discovered, and such ships could not be licensed for operation unless they had been so strengthened. In the language of the industry, such a ship would not be "in class" unless it was so strengthened. The Ship Sales Act required that each ship sold be put "in class" by the Commission, or that the purchaser be allowed a reduction in the purchase price sufficient to pay for putting the ship in class.

Before the plaintiffs, in 1947, applied to the Commission to purchase the tankers which they ultimately received, the Commission had decided to grant to purchasers an allowance on the purchase price to compensate for the cost of slotting and strapping. The statute required the Commission to do this, since without this strengthening the vessels would not be in class. But what the Commission granted with one hand, it took back with the other. For it inserted

a provision in the contract of sale that the slotting and strapping should be regarded as a "desirable feature," the cost of which should be added to the standard price of the ship. It required a deposit of an amount tentatively determined to be that prospective cost and later adjusted that amount, in the case of each of the ships to $16,600.

The plaintiffs protested the inclusion of this provision in their contracts, and the collection of the money from them. But they signed the contracts and accepted the ships. In their memoranda in support of their motions for summary judgment they have made an extensive argument that slotting and strapping was not a "desirable feature" within the meaning of the statute, and could not lawfully be charged for as such. The Government now concedes that the plaintiffs are right, on this point. But, the Government argues, the Commission reached substantially the right result, though it followed the wrong road to reach that result.

The Government now urges that the cost of slotting and strapping should be added to the price of the standard T2 tanker, in determining the statutory sale price, since such tankers, without this strengthening, were found to be inoperable. It recognizes that the statutory sale price was fixed, as the statute required, on the basis of the pre-war cost and the wartime cost of this type of ship; that, as so fixed, it included no amount for slotting and strapping, since no such work was done when the vessels were built. But, it says, no vessel can be a standard vessel unless it is operable, that is, in class, and none of the several hundred T2 tankers could be in class with-

out slotting and strapping, therefore the standard T2 tanker is one that is slotted and strapped, and the cost of doing so is a part of the cost of a standard T2 tanker. It says that it could have, when slotting and strapping became a class requirement in 1947, repriced the standard T2 and published the new price in the Federal Register as the statute required; that it did not do so because the plaintiffs, though under protest, signed the contracts of purchase agreeing to pay for the slotting and strapping as a desirable feature, and that the plaintiffs are estopped from now raising the question of noncompliance with the statutory requirement of publication.

The plaintiffs point out that the T2 tankers, when built in 1944, were in class and operable; that they were the standard vessel of that type and their cost as built was the cost which the Commission was required to find and use, and which it did use in computing the statutory sales price; that such tankers were sold for that price before May 1947, when slotting and strapping was made a legal requirement to put such vessels in class; that the tendency to crack was merely a defect which had to be repaired in order to put them in class, and that the Ship Sales Act required the Commission to do that at the expense of the Government, either by payment for it, or reduction in the purchase price. The plaintiffs say that the statutory pricing formula requires that adjustments in the sales price for class work shall always be downward. Section 3 (d) (1) says, "If the Commission is of the opinion that the vessel is not in class, there shall be subtracted the amount estimated by the Commission as the cost of putting the vessel in class."

Other statutory references to the cost of class work similarly refer to reductions or allowances in the sales price. The only statutory authorization for an increase in price is Section 3 (d) (1) relating to desirable features, and the Government does not now contend that slotting and strapping added a desirable feature.

We think that the Government's present contention for, in effect, redefining the standard T2 tanker as if it had been, when built, slotted and strapped, and adding the cost of that work to its cost, is not sound. These vessels were built and put in operation as standard, operable vessels. They developed defects. The only difference between their defects and those which occur in all vessels is that the defect here in controversy existed in all of them, instead of only in one or several. But, the defects having been discovered, the policy of the statute was that the defects should be repaired so that the ships could be operated. The repairs, to make Government ships operable and salable, were, the statute says, to be made at the expense of the Government.

If, in the light of the disclosed defect, such ships were again being built, they would, no doubt, be built differently. But whether the standard ship would avoid the defect by being slotted and strapped, or in some other way, we can only conjecture. As to the ships here in question, they started out as standard ships of their type, they developed defects, and the defects had to be fixed to make them operable and salable. That fixing was, we think, under the statute, to be done at the expense of the Government.

As to the Government's argument that the plaintiffs are estopped from asserting rights given them by the statute, because they signed contracts, though under protest, agreeing to treat slotting and strapping as a desirable feature, which the Government now concedes it was not, we considered a similar contention in *A. H. Bull Steamship Company* v. *United States,* 123 C. Cls. 520, at page 528. We said that the parties could not, by contract, change the terms prescribed by the statute for the sale of the ships.

We conclude that the Government was not entitled to collect from the plaintiffs any amount for slotting and strapping the tankers, and that each plaintiff may recover the amount so collected from it.

SOUTHEASTERN'S CLAIM FOR REPAIR CHARGES

Paragraph IV of Exhibit A of the contract of purchase under which Southeastern acquired the tanker *Kern Hills* contained the following language:

"* * * IV. Repairs. The Buyer, at the time of delivery of the vessel(s) by the Commission to the buyer, shall pay to the Commission, the cost to the Commission, as determined by the Commission, of certain repairs as follows:

"(a) Vessel(s) operating and not recently withdrawn from lay-up:

"*Kern Hills*

"Repairs made on the vessel(s) by or for the Commission, subsequent to July 1, 1947, up to the class date (including repairs in hand on such date) to the extent that such repairs are in excess of the work which

would have been performed by the Commission had it been preparing the vessel(s) for sale in accordance with its policy relating to class sales to American citizens for American flag operation, less the sum of $6,000 per vessel per month for each calendar month (or portion thereof in excess of 15 days) after completion of such repairs, during which the vessel(s) shall have been operated by or for the Commission subsequent to July 1, 1947. * * *"

Pursuant to this provision of the contract, the Government required Southeastern to deposit $21,781 at the time it acquired the ship. When the liability was finally computed, the Government returned all but $5,116.79 of this amount. Southeastern sues for the $5,116.79.

The vessel *Kern Hills* was not in the laid-up fleet, but was and had been in service for the Government, being operated by a general agent under a cost-plus contract. In applying the above provision of the contract, the Commission listed all repair expenditures which had been made on the ship from July 1, 1947, to the date of sale to Southeastern in January 1948. Then the Maintenance and Repair Division of the Commission analyzed the list and eliminated those items which would have had to be done to put the vessel in class, according to the class requirements at the time the repairs were made. The sum of the items not thus eliminated was charged to the plaintiff, Southeastern, it was given the $6,000 per month credit, and the ultimate charge of $5,116.79 was thus arrived at.

The plaintiff, Southeastern, says that there was no authority given to the Commission by the Ship Sales Act to make this charge, or to require purchasers of ships to agree to it. The Government points to no provision of the statute authorizing the charge. It urges, however, that the charge was fair because otherwise the purchaser of a ship which was in operation would get a ship on which the Government had made expenditures not necessary to put the ship in class, and would get the use of the ship more promptly than if he took a ship from the laid-up fleet.

The repairs charged to the plaintiff included some items that were not required to put the ship in class at the time the repairs were made, but were, because the class standards had been raised, necessary to put the ship in class at the time it was sold to the plaintiff. As to those, it would seem that if it had not been for this provision of the contract, they would have had to be done at Government expense. Other items, such as adjusting compasses and cleaning boilers, done some months before the ship was sold to the plaintiff, would seem to have been recurring expenses, of no permanent benefit to the ship.

The Government says that by Public Law 269, 61 Stat. 585, 603, amending the Ship Sales Act in July 1947, the Commission had been denied authority to perform work on vessels "to be sold" and that, therefore, if it had not recouped the cost of repairs made after that date, it would have violated this law. Before Public Law 269, the Commission had been putting vessels in class at its expense out of appropriated funds. After Public Law 269, the Commission had no appropriated funds for that purpose;

hence, it gave allowances to purchasers of the cost of putting the vessels in class. The change was a bookkeeping change, having no ultimate effect on the Government's finances. The Commission was not forbidden to operate vessels, nor to keep them in repair so that they would operate. The revenues which it derived from operation were a revolving fund available to the Commission.

We think that the repairs provision, inserted in the contract by the Commission, was not authorized by the Ship Sales Act. That Act provided in detail how the sales price was to be computed and what charges and credits were to be allowed to purchasers. Congress knew that there were hundreds of ships to be sold, some laid up and some operating. It knew that, apart from matters adjustable under the provisions of the statute relating to desirable features, and to the cost of putting vessels in class, which matters the Commission was authorized to consider in setting prices, there would be great differences in the condition of different ships, with regard to the condition of paint, the cleanness of boilers, the adjustment of compasses, etc. If such matters were to be allowed to affect the sales prices of ships, Congress might just as well have lodged complete discretion in the Commission to set the price of ships. But neither Congress nor the Commission was willing that that should be done. So Congress laid down the formula, and, we think, showed thereby that other items not included in the formula should be disregarded.

Our conclusion is that the repair charges with which the plaintiff, Southeastern, was charged were not authorized by the stat-

utes. We think that the contract provision purporting to authorize them was void, for the reasons already given.

The plaintiffs' motions for summary judgments are granted. The plaintiff, Southeastern, may have a judgment for $21,716.79. The plaintiff, Paco, may have a judgment for $16,600.

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge,* concur.

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